Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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89-69

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NEWBY FRANKLIN LOVE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Appeal From the United States Court
Of Appeals For the Fourth Circuit

PETITION FOR CERTIORARI - CIVIL CASE

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QUESTION PRESENTED

Does a prosecutor abrogate his responsibility under the Due Process Clause to disclose to a criminal defendant and his counsel all promises and inducements made to a chief prosecution witness through employment of ambiguous language in a written plea agreement, which causes defense counsel to misapprehend the nature and scope of the prosecution's inducement to its key witness?

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On Appeal From the United States Court
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PETITION FOR CERTIORARI - CIVIL CASE

Petitioner, Newby Franklin Love, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on February 13, 1989.[1]

I. OPINION BELOW

The Judgment and Opinion of the Court of Appeals is attached as Appendix A. The Court of Appeals affirmed the judgment of the District Court to deny the Petitioner's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 on the rationale enunciated in the companion case on appeal. *See, United States of American v. Robert Edward Lee*, 867 F.2d 206 (4th Cir. 1989). Because the Court of Appeals relied fully upon the rationale in *United States v. Lee* it is this opinion that will be referred to and discussed extensively in this Petition. The

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[1] The Petition for Rehearing and Suggestion to the Fourth Circuit to rehear the case *en banc* was denied March 21, 1989.

Court of Appeals opinion in *United States v. Lee* is included in Appendix A.

II. JURISDICTION

The opinion of the Court of Appeals was filed on February 13, 1989, and a timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by that Court on March 21, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). *Cf.* Supreme Court Rule 17.1(a) and (c).

III. CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property without due process of law;* nor shall private property be taken for public use, without just compensation. [Emphasis added].

IV. STATEMENT OF FACTS

Newby Franklin Love (hereinafter Petitioner) was convicted in the United States District Court for the District of South Carolina (Columbia Division) of various narcotic offenses and, ultimately, sentenced to serve an aggregate 30-year prison term, which is non-parolable pursuant to the provisions of 21 U.S.C. § 848.[2] Wilbur Rutledge Corvette, Jr.

[2] *See*, Judgment and Commitment attached as Appendix B. Judgment of conviction transpired June 13, 1983, United States Court of Appeals for the Fourth Circuit upheld Petitioner's conviction under direct appeal review in an opinion published at United States v. Love, 767 F.2d 1052 (4th Cir. 1985) (July 3, 1985) (Rehearing en banc denied July 29, 1985).

(hereinafter "Corvette") was the chief prosecution witness against the Petitioner at trial.

With respect to the caliber of importance of Corvette as a key prosecution witness against the Petitioner, the prosecutor below summarized at Corvette's sentencing as following:

> "Your Honor, his testimony in this case was, without saying, most valuable. He was able to lay out the period of the conspiracy from what I called from B to Y. He was not privy to the events that occurred prior to his meeting Mr. Love, nor the cocaine incident that occurred after Mr. Corvette's arrest, but he did lay out the entire conspiracy between those two times.
>
> Now I might point out. Looking back on the various verdicts that were rendered on the different counts. I would have to say that, what Mr. Corvette testified to as to the defendants being involved in those counts, resulted in a guilty verdict." (Appeal Appendix 89-90)

To these observations, the District Court responded:

> "Well, I have no doubt that the jury fully accredited his testimony, because the one thing that the jury wanted read to them was a portion of his testiomony about one of the counts, and they didn't care about the testimony of any other witness." (Appeal Appendix at 90) . . . "And of course hindsight is better than foresight, but I—without [Corvette's] valuable testimony, we have no way of knowing what the results of the case against those other defendants may have been." (Appeal Appendix 181).

Prior to the Petitioner's trial, the prosecution disclosed a copy of the written plea agreement between the Government and Corvette. This written plea agreement is attached hereto as Appendix C. The written plea agreement between the Government and Corvette stated in relevant part:

"Para. 8. If Mr. Corvette provides full and truthful information and cooperates fully, the Federal Government will obtain formal immunity for Mr. Corvette, not to include the RICO conspiracy offense, the conspiracy to import offense, the pending charges in State Court, and any homicide offenses." (Appendix, C-2).

The Agreement further provided:

"Para. 5. The Federal Government agrees to allow Mr. Corvette to plead to an information charging him with one count of conspiracy (18 U.S.C. § 371) to violate the RICO statute (18 U.S.C. § 1962, 1963), with a ten-year maximum sentence exposure if it is satisfied Mr. Corvette has provided full and truthful information and testimony." (Appendix, C-2).

The plea agreement concluded in relevant part by stating, "This document encompasses all agreements and promises between the parties. . . ." (Appendix, C-2).

Subsequent to the Petitioner's trial and conviction, Corvette filed a Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, alleging, as the sole ground for the motion, that the Government breached its plea agreement with him because his presentence report contained accounts of his self-admitted crimes for which, according to Corvette, he had been provided "immunity" per plea negotiations and an agreement with the Government. Corvette contended under oath in his 2255 motion that he had been promised that "no use" at sentencing would be made of any adverse information he provided during his testimony at the Petitioner's trial or during his debriefing with the prosecution. Because the U. S. Probation Officer who prepared the Presentence Investigation Report ("PSI") for Corvette recapitulated Corvette' bad act testimony during the Petitioner's trial in the PSI and because Corvette believed the district court took this information into account at the time the Court formulated his

sentence, Corvette alleged that the prosecution breached its agreement not to use adverse information that was relevant to the district court exercising its sentencing discretion. The Government did not oppose Corvette's 2255 motion, a motion that was supported by a letter the prosecutor had written to the U. S. Parole Commission in behalf of Corvette, after the Petitioner's conviction. The letter advised the U. S. Parole Commission that *"Part of [Corvette's] plea agreement with the government was that none of his statements would be used against him for any purpose."* (Appeal Appendix at 67, October 17, 1984 letter to U. S. Parole Commission from U. S. Attorney of South Carolina). During Corvette's 2255 motion hearing, the Assistant United States Attorney in charge of the prosecution of Petitioner, and principal negotiator for the Government in the plea agreement with Corvette, advised the Court with respect to the allegations in Corvette's 2255 motion:

> "If it please the Court. Your Honor, on behalf of the Government we have studied the allegations that are contained in the [Corvette 28 U.S.C. § 2255] petition. I have also consulted with all parties that were involved in negotiating the earlier plea agreement with Mr. Corvette, which was subject of Criminal Number 83-44.
>
> We also reviewed the transcript of the sentencing proceeding [in Corvette's case]. Your Honor, it appears that certain information was provided to the Court for purposes of sentencing in this case, provided by the Government, and that this information was in the form of certain matters that Mr. Corvette was granted use immunity from prosecution by virtue of the plea agreement, *he had also been informed that this information would not be used against him in any manner."* (Appeal Appendix, 169, Emphasis added).

Even though the Court explicitly asked the Government's counsel about the meaning of paragraph 8 of Corvette's written plea agreement, during Corvette's sentencing

(Appeal Appendix, 74-76) and though the prosecutor had reviewed the Corvette PSI report prior to the sentencing proceeding, the district court was not informed by the prosecutor during Corvette's sentencing, nor by the terms of the "written" plea agreement that was published to the court at the time (Appeal Appendix 71-76), that "no use" could be made of Corvette's self-admitted crimes when the court fashioned what it considered to be an appropriate sentence in light of the ten (10) year cap on punishment imposed by the plea agreement. The district court went so far as to state in its Order vacating the ten (10) year sentence originally imposed on Corvette and reducing Corvette's sentence to 40-months that:

> "The Court was not aware of the government's promise to the defendant [Corvette] that no use in any way would be made of this information against [Corvette] if he were to cooperate and testify." (Appeal Appendix, 130).

The Corvette 2255 hearing proceeding, to include the above quoted Court Order, were placed under seal by the District Court at the conclusion of the 2255 proceeding. (Appeal Appendix, 184). When local newspapers published a story indicating that Corvette had been released from prison earlier than would normally be allowed under the ten (10) year sentence he was originally sentenced, Counsel for the Petitioner launched an investigation to discover the salient facts which entailed, *inter alia*, filing a successful motion in the District Court to unseal the Corvette 2255 proceeding. (Appeal Appendix, 187-222). Based on the information that Corvette had been promised that no use would be made by the District Court during his sentencing of bad act testimony developed during the Petitioner's trial and the fact this information was not clearly set forth in the written plea agreement which the defense received and which was used to attempt the impeachment of Corvette, Petitioner filed a 2255 Motion in the district Court claiming, *inter alia*, that the prosecution evaded its due process responsibility to disclose exculpatory information to the defendant through employ-

ment of ambiguous written language in the plea agreement. Further, that the language presented did not alert the Petitioner, his trial counsel, jury or even the District Court, to the existence of the promise of "no use" made to Corvette. The District Court denied the Motion, and the Court of Appeals affirmed the denial of the District Court. The Court of Appeals held:

> "Here the plea agreement between the Government and Corvette was made available to defense counsel at trial. Its promises to Corvette were explicitly set forth. To the extent that defense counsel believed they were clear, that issue too was open, for exploration at trial. Counsel cannot reserve the 'ambiguity' of every written plea agreement with government witnesses for just this kind of collateral attack. . . .
>
> While the government was unquestionably under an obligation to disclose the bargain with Corvette, it is not at fault whenever opposing counsel misapprehend the import of a plea agreement with a witness." (Pet. Appendix, A-3).

The Court of Appeals went on to state:

> "There is no evidence of governmental deception. The plea agreement referred expressly to a grant of formal immunity for Corvette. He was to receive 'formal immunity' for all offenses except for the two conspiracy charges mentioned in the agreement, and statements given by him as an immunized witness were not to be used against him in a criminal case . . . the words 'criminal case' in the immunity statute clearly contemplate the process of sentencing. If they did not, the grant of immunity would be of dubious benefit to a prospective government witness. Appellant is thus not entitled to complain when upon receipt of the government's letter, the district court vacated Corvette's original sentence. The terms of 18 U.S.C. § 6002 fully authorized such action." (Pet. Appendix, A-3).

In his affidavit in support of the Petitioner's 2255 Motion, trial counsel for the Petitioner related:

> "That a major strategy in the trial of the [Petitioner's] case was to attack the credibility and truthfulness of the Government's chief witness, Wilbur "Rusty" Corvette, Jr. Written discovery requests were appropriately and timely filed which explicitly requested evidence and information concerning all promises, inducements, and agreements the government made to its witnesses. As a result of these requests, a written plea agreement pertaining to Corvette was received.... This written agreement made no mention of the fact that, as a part of its plea agreement with Wilbur Rutledge Corvette, Jr., the government promised Corvette that no use would be made against him, in any way, of any of the criminal activities Corvette was involved in and of which he testified at the Love trial.
>
> Part of the cross-examination of Corvette focused on the issue of whether any promises had been made to Corvette about what his sentence would be. *See, Love Trial Transcript, 188 - 193.* It was the defense strategy to underscore the fact that Corvette's testimony was purely motivated by self-interest which was inconsistent with the goal of truthful testimony. The government's concealment of the promise of "no use" severely constricted the defense ability to fully explore this important line of cross-examination and argument." (Appeal Appendix, 160).

Trial counsel for the Petitioner stated further in his affidavit:

> "It is the Affiant's recollection that paragraph 8 of the written plea agreement between Wilbur Rutledge Corvette and the Government provided for formal immunity, which we understood at the time of the criminal trial in this matter, to mean immu-

nity from prosecution. *We never understood, nor were we informed by counsel for the Government, that formal immunity in paragraph 8 of the written plea agreement involved a promise that none of the adverse information provided by Wilbur Rutledge Corvette would be used against Corvette at sentencing or before the U. S. Parole Commission.* (Appeal Appendix at 353, Emphasis added)

Even though the Petitioner called to the attention of the Court of Appeals the conflict its opinion in this case had with prior decisions concerning the authority of the Government to restrict the sentencing court from considering information relevant to sentencing, per force of "pocket immunity"[3]; the Court of Appeals resolved not to afford Petitioner a remedy. This Petition now follows.

V. REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. THIS CASE PROVIDES THE COURT WITH AN OPPORTUNITY TO CLARIFY WHETHER THE PROSECUTION, OR THE DEFENSE, SHOULD BEAR THE FAULT FOR AMBIGUOUS LANGUAGE IN WRITTEN PLEA AGREEMENTS THAT DOES NOT CLEARLY SET FORTH WHAT HAS BEEN PROMISED TO A PLEA BARGAINING WITNESS.

The Court of Appeals in this case agreed that *United States v. Bagley*, 473 U.S. 667 (1985), obligated the prosecution to disclose fully all promises made to its witnesses to secure adverse testimony against a defendant. The salient aspect of the controversy *sub judice* revolves around who should bear the fault of imprecise language that fails to set forth clearly

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[3] Corvette did not receive "formal immunity" pursuant to 18 U.S.C. 6002, because he was never ordered to testify, nor did the Court ever "order" immunity be granted. Rather, the immunity he received derived solely from the "promises" of the government.

the existence and scope of inducements which form the testimony of a key witness against the defendant, such as Wilbur Rutledge Corvette. Petitioner submits that the prosecution must bear the consequences for imprecise language in written plea agreements that fail to clearly convey "understandings" not reasonably evident from the written text. Indeed, the precedents of the Fourth Circuit compel this conclusion. *See, e.g., Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964): "In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel."

The Court of Appeals decision that counsel is responsible for clarifying ambiguities latent in written plea agreements is fundamentally in conflict with the principle of the Fourth Circuit in *Barbee v. Warden. Compare*, Pet. Cert. Appr. A-3: ("To the extent that defense counsel believed [the plea agreement was] unclear, that issue too was open for exploration at trial. Counsel cannot reserve the "ambiguity" of every written plea agreement with government witnesses for just this kind of collateral attack"), with *Barbee v. Warden, supra*, at 845:

> "It is no answer that Barbee's attorney failed to ask for the results of the tests. While a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at trial."

Barbee v. Warden, demonstrates greater fidelity to *United States v. Bagley*, than does the decision of the Court of Appeals in the case *sub judice*. Petitioner submits that it is an anomaly in the law to hold on the one hand that the prosecution clearly has an obligation to disclose the full terms of plea agreements, and on the other hand, conclude that defense counsel must relieve the prosecution of its due process responsibility by "clarifying" ambiguities in the written text—ambiguities that may not even be obvious, in context, until subsequent events *dehors* the trial unfold. Here the record demonstrates that defense counsel had no idea that the written reference to formal immunity was an umbrella for a

promise to Corvette, by the Government, that the District Court would be handcuffed from consideration of "relevant" information to fashion his sentence, based solely on the grant of pocket immunity by a prosecutor. Additionally, the decision of the Court of Appeals in this case conflicts diametrically with another of its precedents besides *Barbee*. In *United States v. Harvey*, 791 F.2d 294 (4th Circuit 1986), the Fourth Circuit squarely and correctly held that the Due Process Clause required the prosecution bear the weight of untoward consequences attending its employment of imprecise and ambiguous language in written plea agreements. In *Harvey*, the Court held that the Government has a duty to write clearly what is promised and that the employment of less than reasonably clear language will require that the plea agreement be read against the Government. Here, the Court of Appeals places a premium on sloppy draftsmanship of written plea agreements and portends to leave defense counsel, in the Fourth Circuit, bobbing for clarity of "ambiguities" that may or may not be apparent which the Due Process Clause, as interpreted by the Court in *United States v. Bagley*, and its progeny, should not exist in the first place. Petitioner submits that the correct rule in this case, the rule consistent with the Due Process decisions of this Court, must hold that ambiguities in plea agreements that thwart clear understanding of promises the Government makes to its witnesses, is tantamount to suppression of exculpatory evidence. This rule is clearly expressed in *United States v. Bagley*, which obligates the prosecution to disclose impeachment evidence to the defense as an element of its responsibility under the Due Process Clause of the United States Constitution. Imprecision in draftsmanship of plea agreements, to the extent the ambiguous language does not reasonably convey what has been promised to a prosecution witness, abrogates that due process duty of disclosure. Thus the decision of the Court of Appeals in this case, which places blame for the ambiguity upon the shoulders of the defendant-reader rather than the prosecutor-writer, conflicts with the teachings of this Court under *United States v. Bagley*, *supra*, and its progeny.

B. THE COURT OF APPEALS DECISION IN THIS CASE CREATES AN INTRA AND INTER CIRCUIT CONFLICT IN THE LAW AS TO WHETHER THE GOVERNMENT HAS THE POWER, THROUGH THE GRANT OF "POCKET IMMUNITY," TO INSULATE INFORMATION CONCERNING A PLEA BARGAINING WITNESS FROM THE DISTRICT COURT AT SENTENCING. IN RELIANCE UPON THE TEACHINGS OF THE FOURTH CIRCUIT AND FEDERAL STATUTES PERTAINING TO THE AUTHORITY AND DUTY OF THE DISTRICT COURT AT SENTENCING, COUNSEL FOR THE PETITIONER HAD NO REASONABLE WAY OF DISCOVERING THAT THE GRANT OF POCKET IMMUNITY ENTAILED A PROMISE TO WITHHOLD IMFORMATION RELEVANT TO CORVETTE'S SENTENCING FROM THE DISTRICT COURT.

When trial counsel for the Petitioner read the written plea agreement between the Government and Corvette, they had no idea that the reference to "formal immunity" in the plea agreement meant that the Government could promise a plea bargaining defendant that information relevant to his sentencing would be withheld from the District Court under the auspices of immunity. (*Cf.* Appeal Appendix at 160-163, Affidavit of Robert E. Kneece, Esquire.) (*Also*, Appeal Appendix 353-354, Affidavit of Robert E. Kneece, Esquire and Carlos W. Gibbons, Jr., Esquire.) The reason for the belief of counsel for the Petitioner to this effect is manifold. First, counsel was unaware that a "court ordered" immunity provided by 18 U.S.C. §6002 had been granted in this case. As the Court of Appeals correctly discerned, 18 U.S.C. §6002 provides in relevant part, with respect to "court ordered" immunity under the state that:

> "... the witness may not refuse to comply with the *order* on the basis of his privilege against self-incrimination; but no testimony or other information

> *compelled under the order* (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (*18 U.S.C. 6002 quoted by Court of Appeals at Pet. for Cert. Appendix at 3.* Emphasis added.)

Plainly, 18 U.S.C. §6002 contemplates court-ordered immunity. What was granted here was pocket immunity by a prosecutor without court approval. Even to the extent pocket immunity is co-extensive with court-ordered immunity provided for by 18 U.S.C. §6002, reason and authority dictate that this statute not be construed to permit the Government unilaterally to usurp the Congressionally imposed duty of the District Court to consider all relevant information pertaining to a defendant, even a plea bargaining witness whose patron is the Government at sentencing. Trial Counsel for the Petitioner relies upon form 18 U.S.C. §3577 for the understanding that the grant of immunity could not authorize the withholding of information pertaining to a plea bargaining witness, relevant to sentencing, from the District Court. Hence, there was no reasonable way for defense counsel to know such a promise had been extended to Corvette under the ambiguous auspices of the term "formal immunity." Counsels' belief were not of airy variety, rather, the fact that counsel had not the foggiest idea that such a promise had been extended to Corvette, from reading the plea agreement, was grounded in black-letter language of a federal statute. 18 U.S.C. §3577 provided:

> *"No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purpose of imposing an appropriate sentence."* (Emphasis added)

The prior case law in effect at the time of Petitioner's trial instructed that, pursuant to 18 U.S.C. §3577, the information of a sentencing court was authorized and instructed by Congress to receive in determining appropriate punishment for a convicted federal defendant, was *"largely unlimited either as to the kind* of information [the district court] may consider, *or the source from which it may come." United States v. Lee*, 540 F.2d 1210 (4th Cir. 1976). (*Cf.*, Appeal Appendix at 344). More to the point, the Fifth Circuit squarely held in *United States v. Block*, 660 F.2d 1086, 1091 (5th Cir. 1981), *cert denied*, 456 U.S. 907, 102 S.Ct. 1753, 72 L.Ed.2d 164 (1982), that immunity pursuant to 18 U.S.C. §6002 could not authorize or justify withholding relevant information from the sentencing court without trespassing the requirements of 18 U.S.C. §3577. The Fourth Circuit agreed with this holding of *Block*, in *United States v. Reckmeyer*, 786 F.2d 1216, 1223 (4th Cir. 1986) (Rehearing and Rehearing en banc denied April 30, 1986) ("The government, of course, does not have the right to make an agreement to withhold relevant factual information from the Court"). The irony here is that the Fourth Circuit failed to discuss 18 U.S.C. 3577, *United States v. Lee; United States v. Block;* or even *United States v. Reckmeyer*, in holding:

> "The words 'criminal case' in the immunity statute clearly contemplate the process of sentencing. If they did not, the grant of immunity would be dubious benefit to a prospective government witness. Appellant is thus not entitled to complain when upon receipt of the government's letter, the district court vacated Corvette's original sentence. The terms of 18 U.S.C. 6002 fully authorize such action. We cannot accept the suggestion that the government was guilty of misconduct in this case. The government properly disclosed to the district court the fact that immunized statements were utilized at Corvette's original sentencing. In doing so, it attempted to respect the terms of its plea bargain with Corvette." (Pet. for Cert. Appendix at 3).

The need for intervention of this Court is compelling. As can be readily discerned from the conflicting opinions above, a defense counsel in the Fifth Circuit would have no reason to believe that the term "formal immunity" in a plea agreement authorized the withholding of bad act information concerning the plea bargaining witness from the district court at the time of his sentencing. Accordingly, a Fifth Circuit defense counsel would not have a basis for planning a defense to impeach the plea bargaining witness in the presence of the jury by exposing the fact that the witness's bad acts which were totally consistent with his penal interest and unworthy of belief in assessing his credibility. This is so because the plea bargaining witness knows these admissions cannot harm him where it must count, at sentencing. Until the Petitioner's case, a defense counsel in the Fourth Circuit had no reason to believe the Government had the power to make such a promise as was made to Corvette, and consequently no reason to believe that such a promise was made. But now, with *United States v. Reckmeyer*, in diametric conflict with the Petitioner's case, what is reasonable for counsel to believe with respect to what formal immunity means regarding withholding of information relevant to the sentencing of a plea bargaining defendant, has the predictability of a coin-toss. The district courts in the Fourth Circuit, and the Fourth Circuit itself, have a fifty (50%) percent chance of going either way on the point any time the issue arises.

CONCLUSION

Conflicting decision-making within the Fourth Circuit such as that presented in this case does manifest infidelity to the prescriptions of Due Process that the teachings of this Court require. Moreover, the Fourth Circuit has sanctioned a departure from settled jurisprudence so far from the normal that the supervisory power of this Court should become operative to rectify what will otherwise be a profound inconsistency in the law. The Petition for Certiorari should be granted.

Respectfully submitted, this _____ day of June, 1989.

William Otis Kneece

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OCTOBER TERM, 1989

NEWBY FRANKLIN LOVE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI - CIVIL CASE

CERTIFICATE OF SERVICE

I hereby certify that I did mail a bona fide copy of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, c/o United States Department of Justice, Washington, D. C. 20530, Counsel for the Respondent, United States of America, first class mail, postage pre-paid.

William Otis Kneece
Counsel for the Petitioner

APPENDIX A

A.1
APPENDIX

UNITED STATES of America,
Plaintiff-Appellee.
v.
Robert Edward LEE,
Defendant-Appellant.

No. 88-7684.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 8, 1988.
Decided Feb. 13, 1989.

Defendant sought to vacate sentence. The United States District Court for the District of South Carolina, Charles E. Simmons, Jr., Senior District Judge, denied relief, and defendant appealed. The Court of Appeals, Wilkinson, Circuit Judge, held that defendant had been adequately informed of nature of plea agreement between witness and prosecution.

Affirmed.

1. Criminal Law—997.4

Contention that plea agreement entered into between witness and Government was ambiguous so that its full import was not revealed to defendant when he was given a copy of the agreement could not provide basis for collateral attack, following conviction, by way of motion to vacate sentence. 28 U.S.C.A. § 2255.

2. Criminal Law—273.1(4)

Government adequately revealed to defendant nature of plea agreement between witness and the Government by providing him with a copy of the written agreement, despite claim that it was not until after trial that the defendant learned that the grant of immunity included use of evidence of certain crimes for sentencing purposes and not just prosecution for those crimes. 18 U.S.C.A. § 6002.

3. Criminal Law—42

Words "criminal case" in federal immunity statute contemplate the process of sentencing. 18 U.S.C.A. § 6002.

See publication Words and Phrases for other judicial constructions and definitions.

Mortimer Meyer Weinberg, Jr. (Weinberg, Brown & McDougall, Sumter, S. C., on brief), for defendant-appellant.

David Jarlath Slattery, Asst. U. S. Atty. (Vinton D. Lide, U. S. Atty., Columbia, S. C., on brief), for plaintiff-appellee.

Before WIDENER, ERVIN, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

Robert E. Lee appeals the district court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255. He claims the prosecution erred in not disclosing the extent of its plea agreement with Wilbur Rutledge Corvette, Jr., a key government witness at Lee's trial. We hold, however, that the government did not default on its obligations of disclosure and we affirm the judgment of the district court.

I.

Robert E. Lee was convicted in 1983 after a two-week jury trial on seven drug-related counts. Lee was given an effective sentence of twenty-five years plus a special parole term of twenty-five years. The convictions were affirmed upon direct appeal. *United States v. Love, et al*, 767 F.2d 1052 (4th Cir.1985), *cert. denied*, 474 U. S. 1081, 106 S. Ct. 848-9, 88 L.Ed.2d 890 (1986).

Lee's trial lasted from April 21 through May 9. The government's evidence included more than 80 witnesses and more than 150 exhibits, including baled marijuana and a duffel bag of cocaine. Some of the government's witnesses, including Wilbur Corvette, had entered into plea agreements with the government. Because Corvette had operated most closely with the defendants and had been involved in much of

the criminal activity, his testimony was particularly damaging. Much of it, however, was also corroborated by other witnesses.

Corvette's agreement permitted him to plead to counts with a maximum exposure of ten years and included the following language:

> If Mr. Corvette provides full and truthful information and cooperates fully, the Federal Government will obtain formal immunity for Mr. Corvette, not to include the RICO conspiracy offense, the conspiracy to import offense, the pending charges in State Court, and any homicide offenses....

The agreement goes on to state that it encompasses all promises between the parties.

The written plea agreement with Corvette was made available to defense counsel at Lee's trial. When Corvette was sentenced, however, the court took into consideration crimes to which Corvette had testified under promise of immunity and sentenced him to the maximum term of ten years.

Corvette subsequently filed a motion for § 2255 relief on the grounds that his sentence was based in part upon statements made under grant of formal immunity. The government informed the court and the Parole Commission that statements made by Corvette under a promise of immunity relating to crimes other than those charged, could not be used against Corvette in a criminal case. The trial judge thereupon vacated Corvette's sentence and imposed a much reduced one.

Lee now claims that because the full extent of Corvette's immunity was not made known at trial, the jury was unable to properly evaluate Corvette's testimony.

II.

[1] It is axiomatic that plea bargains made between the government and a witness must be fully disclosed to the defendant. *United States v. Bagley*, 473 U. S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Here the plea agreement between the government and Corvette was made available to defense counsel at trial. Its promises to Corvette were explicitly set

forth. To the extent that defense counsel believed they were unclear, that issue too was open for exploration at trial. Counsel cannot reserve the "ambiguity" of every written plea agreement with government witnesses for just this kind of collateral attack.

[2] Here the terms of the plea agreement and the grant of formal immunity incorporated therein were read to the jury. The substantial benefits Corvette received from the bargain were used to impeach him. The cross-examination of Corvette was extensive. The district court noted that "several defense counsel on cross examination, including Lee's own counsel, dealt extensively with Corvette's unsavory background. Corvette was fully examined concerning crimes in which he had been neither indicted, accused, or allegedly involved, in an effort to impeach him because of his extensive and serious prior record."

While the government was unquestionably under an obligation to disclose the bargain with Corvette, it is not at fault whenever opposing counsel misapprehend the import of a plea agreement with a witness. There is no evidence here of governmental deception. The plea agreement referred expressly to a grant of formal immunity for Corvette. He was to receive "formal immunity" for all offenses except for the two conspiracy charges mentioned in the agreement, and statements given by him as an immunized witness were not to be used against him in a criminal case. The federal statute providing for formal immunity reads as follows:

> ... the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1988).

[3] The words "criminal case" in the immunity statute clearly contemplate the process of sentencing. If they did not,

the grant of immunity would be of dubious benefit to a prospective government witness. Appellant is thus not entitled to complain when upon receipt of the government's letter, the district court vacated Corvette's original sentence. The terms of 18 U.S.C. § 6002 fully authorized such action.

We cannot accept the suggestion that the government was guilty of misconduct in this case. The government properly disclosed to the district court the fact that immunized statements were utilized at Corvette's original sentencing. In so doing, it attempted to respect the terms of its plea bargain with Corvette. *See United States v. Griley*, 814 F.2d 967, 972 (1987). This fact, of course, distinguishes the instant situation from *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), where the government interpreted an ambiguity in the plea agreement to the detriment of defendant and to the possible derogation of its bargain. Finally, we find no evidence that the government struck any side agreements with Corvette or reached any understandings that were not embodied and disclosed to defendant in the written plea agreement.

For the foregoing reasons, the judgement of the district court is

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Newby Franklin LOVE,
Defendant-Appellant.

No. 88-7647.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 8, 1988.
Decided Feb. 13, 1989.

William Otis Kneece (Kneece, Kneece, Ashley, Gibbons & Kneece, on brief) for defendant-appellant.

David Jarlath Slattery, Asst. U. S. Atty. (Vinton D. Lide, U. S. Atty., on brief), for plaintiff-appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia, Charles E. Simons, Jr., Senior District Judge.

Before WIDENER, ERVIN and WILKINSON, Circuit Judges.

PER CURIAM:

Newby Franklin Love has appealed from the denial of his motion to vacate sentence[1] by the District Court of South Carolina. Although the two cases were not consolidated for purposes of appeal, Love's oral argument was heard in this court at the same time as that of Robert Edward Lee, an original co-defendant, and the assignments of error pressed by Love and Lee are substantially identical.

After taking into consideration the briefs, oral arguments, and pertinent authorities, we affirm the denial of Love's motion for the reasons fully articulated in the opinion filed in the companion case of *United States v. Robert Edward Lee*, 467 F.2d 206 (4th Cir. 1989) (No. 88-7684, 4th Cir. Feb. 13, 1989).

AFFIRMED.

A.7
APPENDIX

UNITED STATES of America,
Plaintiff - Appellee

v.

Newby Franklin LOVE,
Defendant - Appellant

No. 88-7647

United States Court of Appeals,
Fourth Circuit

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin with the concurrence of Judge Widener and Judge Wilkinson.

For the Court,
John M. Greacen, Clerk

Filed March 21, 1989
United States Court of Appeals
Fourth Circuit

APPENDIX B

6-17-83	JUDGMENT & COMMITMENT ORDER (CESjr)	Ct. 19—CAG Fifty (50) Years; Ct. 1—CAG Twenty (20) Years, consecutive to Ct. 19; Ct. 4—CAG Five (5) Yrs., concurrent w/Ct. 1; Ct. 9—CAG Five (5) Yrs., concurrent w/Cts. 1 & 4; Ct. 12—CAG Five (5) Yrs., concurrent w/Cts. 1, 4 & 9. (Total Sentence: CAG 70 Years) Further Ordered that Ct. 15 of the Sup. Indictment and Cts. 1, 2, 3, 4 of the original Indictment are dismissed. (eod 6-17-83) mld

APPENDIX C

C.1

APPENDIX C

PLEA AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND WILBUR RUTLEDGE CORVETTE, JR.

This Memorandum sets forth the understanding and promises made between Wilbur Rutledge Corvette, Jr., and the United States by its counsel, Cameron B. Littlejohn, Jr., Assistant United States Attorney.

Wilbur Rutledge Corvette, Jr. is presently incarcerated on criminal charges pending in Richland County, South Carolina, arising out of a failure to appear and armed robberies. The activities which gave rise to these charges also encompass violations of the criminal laws of the United States.

After advising with counsel on his state charges, Corvette has indicated a desire to cooperate with governmental authorities and provide full and truthful information concerning criminal activities he has participated in and about which he has knowledge in South Carolina and elsewhere. In return for Mr. Corvette's full and truthful statements, delivery of all documents and other evidentiary objects in his possession or control, the United States agrees to allow Mr. Corvette to plead guilty to one count of conspiracy to violate RICO and one count of conspiracy to import marijuana with a ten-year maximum sentence exposure and not to prosecute Mr. Corvette for any other offenses about which he furnishes truthful information, excepting homicide.

Mr. Corvette is entering into this agreement without having counsel as to proceedings in Federal Court. He understands that he has the right to counsel during these plea negotiations, but expressly waives that right. Mr. Corvette has had the opportunity to confer with counsel for his state criminal proceedings and is fully aware of the consequences of entering into this plea agreement with the Government.

The terms of this plea agreement are as follows:

1. Mr. Corvette agrees to give a full and truthful statement concerning any knowledge he has of criminal activities

to agents of the South Carolina Law Enforcement Division and any federal law enforcement agency which may have an interest in the information;

2. Mr. Corvette agrees to provide any documentary or tangible evidence or information relating to tangible evidence or contraband goods which he has knowledge, and he understands investigations will be undertaken to corroborate and verify any information provided by him;

3. Mr. Corvette agrees to appear and testify truthfully in any federal or state grand jury proceeding or trial concerning the information he provides;

4. Mr. Corvette agrees to submit to a polygraph examination concerning the information he provides;

5. The Federal Government agrees to allow Mr. Corvette to plead to an information charging him with one count of conspiracy (18 U.S.C. §371) to violate the RICO statute (18 U.S.C. §§1962, 1963) and one count of conspiracy to import marijuana (21 U.S.C. §963), with a ten-year maximum sentence exposure if it is satisfied Mr. Corvette has provided full and truthful information and testimony;

6. The Federal Government will make the Court aware of its opinion on degree and truthfulness of Mr. Corvette's cooperation at the time of sentencing;

7. The Federal Government will make known to appropriate state and local authorities the degree and extent of Mr. Corvette's cooperation.

8. If Mr. Corvette provides full and truthful information and cooperates fully, the Federal Government will obtain formal immunity for Mr. Corvette, not to include the RICO conspiracy offense, the conspiracy to import offense, the pending charges in State Court, and any homicide offenses.

This document encompasses all agreements and promises between the parties and if either party breaks any of the conditions and promises contained herein, the entire Agreement is null and void, and any statements made by Mr. Corvette may be used against him in any subsequent criminal proceeding.

APPENDIX C

12/21/82	Wilbur Rutledge Corvette, Jr.
DATE	WILBUR RUTLEDGE CORVETTE, JR.
December 21, 1982	Henry D. McMaster
DATE	HENRY DARGAN McMASTER United States Attorney Attorney for the United States
Dec. 21, 1982	Cameron B. Littlejohn, Jr.
DATE	CAMERON B. LITTLEJOHN, JR. Assistant U.S. Attorney Attorney for the United States